IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF AMERICAN SOCIETY OF PERSONNEL ADMINISTRATION AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS AMICI CURIAE

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CONSENT TO FILING

This Amici brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

The American Society for Personnel Administration and the International Personnel Management Association join together as *Amici Curiae* for this case.

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and industrial relations executives, representing nearly 23,000 professionals in business, government, and education dedicated to the furtherance of personnel and

industrial relations management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

The International Personnel Management Association (IPMA) is an organization representing 1,000 member agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association, which was established in 1973 by the consolidation of the Public Personnel Association (founded in 1906) and the Society for Personnel Administration (founded in 1937), also represents over 4,000 individual members, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

While the case at bar is more directly relevant to the private sector, the public and private sectors share common interests in the area of personnel administration. It is for this reason that IPMA joins ASPA in filing this brief as *Amici Curiae*.

The *Amici* are particularly concerned that the enforcement and interpretation of laws and regulations governing employment be mutually compatible, and that the diverse agencies of government charged with the regulation of the workplace be cognizant of the need to enforce the laws entrusted to them in a rational and consistent manner. The *Amici* believe that this case presents a classic case of regulatory "tunnel vision," in which the NLRB chose to fashion a remedy for an alleged violation of the NLRA—the statute which it enforces—in a manner which would create significant barriers to compliance with another statute which it does not enforce: Title VII of the Civil Rights Act of 1964, as amended. Further, the cavalier treatment given by the court below to the serious effort of the psychological profession to effect a responsible code of practice, prompted in large part by the development of Title VII law, is cause for great concern.

The *Amici* are particularly concerned with maintaining public confidence in selection procedures. Job-related, valid examinations are often the basis for selecting the best qualified personnel in both private industry and in government merit systems. The release of test materials, as ordered by the court below, would shake public confidence in the fairest system for making employment decisions yet devised.

Amici ASPA and IPMA believe that this case provides the proper vehicle for the Supreme Court to articulate an appropriate balance between two major laws which impact heavily on the workplace. Further, this case calls for this Court to reiterate its admonition to the separate, specialized regulatory agencies that they avoid addressing cases before them in a vacuum, and act "with a discriminating awareness of the consequences of [their] action." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 174 (1962).

SUMMARY OF ARGUMENT

The past fifteen years have witnessed an explosion of laws, regulations, Executive Orders and ordinances at all levels of government, State and Federal, designed to regulate every facet of the employment relationship. In addition to earlier laws designed to provide a framework for peaceful industrial relations, and setting

forth minimum standards for wages and hours, complex regulatory schemes have been devised to insure that the workplace is free from discrimination, to insure that it is free from hazards to the safety and health of employees, and to insure that the various pension and welfare programs which workers have come to expect are prudently managed and financially secure. To all this have been added decisions of courts and quasi-judicial adjudicatory bodies interpreting, analyzing, and expounding upon the impact of each of these laws on the workplace.

Too often, this multifarious regulation of the workplace has imposed competing or conflicting requirements on employers. Little or no effort has been made by the executive and legislative branches to construct a coherent policy, weaving together all these requirements so that employers can understand their legal requirements and structure employment policies, practices and procedures accordingly. It has fallen to this Court to formulate rules to harmonize these competing requirements, and to solve what Mr. Justice Harlan characterized as "a problem of line drawing." *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, 284 (1968) (Harlan J. concurring).

The need for such "line drawing" is particularly strong in this case. The NLRB and the court below held that the refusal of the petitioner, an employer, to disclose to its union employment tests, answer sheets, and the scores of individuals, constituted a failure to bargain in good faith. Yet for the employer to comply with this requirement would cripple its ability to fill vacancies with the best qualified personnel while complying with the requirements of equal opportunity law!

We believe further that the NLRB and the court below misapplied the obligation to bargain in good faith, and injected themselves into substantive matters of bargaining which the Congress has reserved to the parties.

In the last analysis, this case brings up the most fundamental question of government regulation of the workplace. That issue is whether, consonant with the essential requirements of maintaining harmonious and just industrial relations, and applying fair and nondiscriminatory practices and procedures, an employer may not look to professionally developed employee selection devices to enable it to choose, among the candidates for a job, that person possessing in the most abundant degree the qualities and abilities suited to successful performance. It is the position of the *Amici* that as a matter of fundamental public policy an employer is free to do so, and that the many requirements which statutes and regulations impose upon employers can be, and by this Court should be, harmoniously interpreted to that end.

ARGUMENT

I

THE DISCLOSURE TO THE CURRENT UNION OFFICERS OF THE TESTS, ANSWER SHEETS, RAW UNANALYZED TEST SCORES AND IDENTIFICATION OF TEST TAKERS WILL PREVENT EMPLOYERS FROM USING TESTS OR OTHER OBJECTIVE EMPLOYEE SELECTION DEVICES BY RENDERING VALIDATION OF THE SELECTION PROCEDURES IMPOSSIBLE.

A. The Developing Body of Equal Employment Law Compels Employers to Use Objective Employee Selection Devices. Even Absent the Public Law Imperative, Employers Must Turn to These Objective Selection Devices in Order to Choose the Best Qualified Person for the Increasingly Sophisticated Industrial Tasks in the Economy.

The purpose of the various laws designed to protect equal employment opportunities was succinctly summarized by this Court in the landmark case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), when it declared the objective of Title VII of the Civil Rights Act of 1964 was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." [1] In addressing this purpose, courts have focused upon the various employment processes to determine whether the process serves invidiously to screen out otherwise qualified persons because of their racial, religious, or ethnic identity or their sex.[2]

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[1] See also Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977).

[2] Griggs, *supra* (testing); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (supervisory evaluations); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) (recruitment); Leisner v. N.Y. Telephone Co., 358 F.Supp. 359 (S.D. N.Y. 1973) (interviewer ratings); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) *cert. denied*, 409 U.S. 982 (1972) (pay increases); Baxter v. Savannah Sugar & Refining Corp., 495 F.2d 437 (5th Cir. 1974) *cert. denied*, 419 U.S. 1033 (1974) (promotions).

The effect of this process is to assure that the person charged with the final hiring decision is presented with a choice of applicants selected because of their ability to perform the job and not because of their membership or nonmembership in a racial, religious or ethnic group, or because of their sex. See *Griggs, supra;* see also *City of Los Angeles* v. *Manhart*, 435 U.S. ——, 46 U.S.L.W. 4747 (April 25, 1978), where the Court reiterated Title VII's mandate to focus on the individual rather than on the group.

The efficacy of standardized employment tests has been recognized by the Congress, and by the administrative agencies charged with enforcing the various equal employment laws. Section 703(h) of Title VII, 42 U.S.C. § 2000-2(h), provides that the use of "professionally developed ability tests" is a sanctioned activity as long as the tests are not designed, intended or used to discriminate. The agencies and the courts have gone further, and recognized proper testing as a *preferred* activity. The current EEOC Guidelines state as a matter of policy that "*properly validated* employee selection procedures can *significantly contribute* to the implementation of nondiscriminatory personnel policies, as required by Title VII." 29 C.F.R. § 1607.1(a) (1977) (emphasis added). Proposed new federal inter-agency Guidelines recognize the importance of objective selection devices in the development of a nonbiased personnel program and the need for clear guidance as to an

employer's obligation to conduct a testing program free of discriminatory characteristics. See 42 Fed. Reg. 65542 (Dec. 30, 1977). While it is true that Congress did not outlaw subjective employment practices, *Hester* v. *Southern Railway Company,* 497 F.2d 1374 (5th Cir. 1974), one of the major teachings of the equal employment cases is that the use of objective selection devices is a preferred activity, provided that they are validated as job-related in accordance with accepted professional standards. See *Washington* v. *Davis,* 426 U.S. 229 (1976); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Reed* v. *Arlington Hotel Company,* 476 F.2d 721 (8th Cir. 1973), *cert. denied,* 414 U.S. 854 (1973); *Rowe* v. *General Motors Corp., supra,; United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. (1971), *cert. denied,* 406 U.S. 906 (1972).

Supplementing these legal imperatives for employers to operate personnel systems free from discriminatory features is their need to have qualified employees to perform increasingly sophisticated industrial tasks. Indeed, the record shows that the very job in question in the instant case ("Instrument Man") is one in which "fairly frequent opportunity to cause extremely serious operating conditions from misjudgment or erroneous action exists. Instrument Men are often exposed to hazards as well as adverse working conditions." (Appendix, p. 354).

Especially in view of the social and economic significance of safe and efficient operation of power plants, the legitimacy of Detroit Edison's decision to utilize professionally developed and validated employment tests as part of the selection process is beyond question. Indeed, the necessity for all employers to upgrade the quality of their workforce to meet the requirements of

modern society has received judicial recognition. See *Townsend* v. *Nassau County Medical Center,* 558 F.2d 117 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978). And the sponsors of Title VII were explicit that "an employer may set his qualifications as high as he likes," and may test to determine those qualifications, as long as the tests are job related. 110 Cong. Rec. 7213; see *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434 n. 11.

B. In Order to Comply with Federal Regulation of Objective Employee Selection Devices, Employers Must Validate Their Tests in Accord With Professional Validation Standards.

This Court has consistently held that the criteria by which employment tests are to be judged are those promulgated by recognized professional societies. *Albemarle Paper Co.* v. *Moody, supra; Washington* v. *Davis, supra.* Most recently, this Court affirmed without opinion a decision by a three-judge district court that the National Teachers Examination passed constitutional and statutory challenge because it was validated as job-related according to professional standards. *United States* v. *South Carolina,* 54 L. Ed. 2d 775 (1978). The three-judge court there affirmed stated that "[t]o the extent that the EEOC guidelines conflict with well-rounded expert opinion and accepted professional standards, they need not be controlling." *United States* v. *South Carolina, supra.* See *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976)

The enforcement agencies likewise recognize the controlling force of professional standards. They do not themselves prescribe the way in which tests are to be validated, but quite properly make reference to the standards of the American Psychological Association (the APA). Thus, the Guidelines of the Equal Employment Opportunity Commission (EEOC) respecting use

of tests or other selection procedures require that evidence of validity must be based upon "studies employing generally accepted procedures . . . such as those described in the Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association. 29 C.F.R. § 1607.5 (1977). Similarly, joint regulations promulgated by the Labor Department implementing equal employment requirements for government contractors under E.O. 11246, 41 C.F.R. Part 60-3 (1977), the Justice Department under its varied responsibility for enforcing equal employment laws, 28 C.F.R. § 50.14 (1977), and the Civil Service Commission under its responsibilities with respect to state and federal employment, all describe the APA standards as the "generally accepted professional standards for evaluating standardized tests and other assessment techniques." *E.g.*, 41 C.F.R. § 60-3.5(b) (1977) (Labor Department). And on December 30, 1977, the EEOC, the Departments of Justice and Labor, and the Civil Service Commission published for comment a proposed revised set of joint testing guidelines, 42 Fed. Reg. 65542 (Dec. 30, 1977), which by their own terms are designed to represent "professionally acceptable methods" of the psychological profession for demonstrating job-relatedness of a selection procedure, and which reaffirm the APA standards as "the generally accepted professional standard." 42 Fed. Reg. 65542 at § 5(c) (Dec. 30, 1977).

Under the APA standards, which have been given such controlling force, *test security is a prerequisite to the proper validation of an employee selection device.* Standard I5 of the APA as published provides:

I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.

COMMENT: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures would destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test.

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTS 67 (1974) (hereinafter "APA STANDARDS").

Standard J2 of the APA Standards states:

J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.

COMMENT: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject, or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores. *Id.* at 68.

Supplementing the APA Standards, the Division of Industrial-Organizational Psychology of the APA (Division 14) has published a set of principles described as the "official statement of the Division concerning procedures for validation research, personnel selection, and promotion."

That Division's Principle C-13 provides:

> The psychologist or other test user is responsble for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests.

APA Division of Industrial-Organizational Psychology, Principles for Validation and Use of Personnel Selection Procedures (hereinafter "Division 14 Principles") 15 (1975).

Under these judicially recognized professional standards, tests disclosed to laymen in the manner ordered by the NLRB and the court below could not be validated as job-related under the requirements of equal opportunity law. Indeed, the disclosures would prevent an employer from even *attempting* to perform a professionally acceptable validation of the test. As one leading authority in the field has put it:

> An essential precaution in finding the validity of a test is to make certain that the test scores do not themselves influence any individual's criterion status. For example, if a college instructor or a foreman in an industrial plant knows that a particular individual scored very poorly on an aptitude test, such knowledge might influence the grade given to the student or the rating assigned to the worker. Or a high-scoring individual might be given the benefit of the doubt when academic

grades or on-the-job ratings are being prepared. Such influences would obviously raise the correlation between test scores and criterion in a manner that is entirely spurious or artificial.

This possible source of error in test validation is known as criterion contamination, since the criterion ratings become 'contaminated' by the rater's knowledge of the test scores. To prevent the operation of such an error, it is absolutely essential that no person who participates in the assignment of criterion ratings have any knowledge of the subjects' test scores. *For this reason, test scores employed in 'testing the test' must be kept strictly confidential. It is sometimes difficult to convince teachers, employers, military officers, and other line personnel that such a precaution is essential.* In their urgency to utilize all available information for practical decisions, such persons may fail to realize that the test scores must be put aside until the criterion data mature and validity can be checked.

> A. Anastasi, Psychological Testing 106 (3d ed. 1968) (emphasis added).

As noted by the dissenting opinions in both the NLRB and the court below, the controls placed by the NLRB over disclosure of the materials were merely "hortatory," and offered no real security against improper disclosure.[3] Even if the union officials who received the tests did keep them confidential, there is no assurance that the security of the tests would be maintained. The local union is required to conduct an election for all of its officers at least once every three years. 29 U.S.C. § 481(b). Thus, the officers who would receive the materials in confidence may be relieved of their of-

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[3] NLRB v. Detroit Edison Co., 560 F.2d 722, 727 (6th Cir. 1977), *appeal pending*.

ficial union responsibility; and their subsequent use of their knowledge with respect to the tests, either to further their own positions or to the detriment of other employees, would be impossible to police.

C. The Request of the Union for the Tests and Related Documents and the Order of the NLRB and the Sixth Circuit Granting the Union's Request in Full Was Based Upon the Erroneous Concept That Lay Persons Could Make Informed Judgments of the Predictiveness of a Selection Device by Determining Its "Face Validity."

In the present case, the employer, Detroit Edison Company, was requested by the union to turn over to the union a battery of employment tests, and supplementing documents. The employer denied the union's specific request, but, as summarized by the dissent in the court below, it "furnish[ed] to the union a wealth of material, which included: the company's 1970 validation report of the tests; the 1972 National Compliance Company Validation Report; explanations of the batteries of tests given; representative sample questions from the batteries; the test scores of all of the applicants, but without revealing which examinee received the score."[4] The employer made further offers of disclosure, including "the name and test score of any examinee who consented thereto. . . . The company further offered to permit the union's representative, Mr. Clem Lewis, to take the tests. The company further offered to turn over to a qualified psychologist selected and employed by the union, all of the withheld material which the union requested."[5] The union refused the employer's offer, and demanded the full disclosure of all materials.

[4] NLRB v. Detroit Edison Co., *supra* at 727.

[5] *Id.* at 727.

The court below noted that "[i]t is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist,[6] and that "[t]his may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents. . . ."[7] However, the court stood behind the Board's admittedly broad authority in fashioning remedies, and ordered disclosure.[8]

The request of the union for the actual tests, unanalyzed raw scores of the test takers, answer sheets and related documentation was in fact predicated upon a concept in psychological testing known as "face validity." Face validity is not validity in the professionally accepted definition of the term. Rather, it relates to the appearance of the test to the test taker and to the employer:

> Content validity should not be confused with face validity. The latter is not validity in the technical sense; it refers, not to what the test actually measures, but to what it appears superficially to measure. Face validity pertains to whether the test 'looks valid' to the subjects who take it, the administrative personnel who decide on its use, and other technically untrained observers. Fundamentally, the question of face validity concerns rapport and public relations.

A. ANASTASI, PSYCHOLOGICAL TESTING 104 (3d ed. 1968). As another authority has put it: "A test that seems relevent to the layman is said to have 'face validity.'

[6] NLRB v. Detroit Edison, *supra* at 726.

[7] *Id.* at 727.

[8] *Id.* at 726.

Adopting a test just because it appears reasonable is bad practice; many a 'good-looking' test has failed as a predictor."

CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 183-4 (3rd ed. 1970).

Indeed, this question of face validity underlies the entire case. The record clearly shows that the sole reason for the union's request for the tests and supporting data was to make a lay determination of the face validity of the test. See App. pp. 27-30, 50-55. Yet the record shows equally clearly that the union was incapable of making any informed determination about the validity of the test. (App. pp. 28-44.) That the rationale underlying the union's request was specious does not end the issue. For in ordering the disclosure in the exact form and content of the union's request the NLRB and the court below destroyed the future usefulness of the tests, prevented their further validation, and subjected the employer to potential serious and costly equal employment liability under Title VII if it does not abandon testing for this sensitive job.

II

EVEN ABSENT TENSION BETWEEN THE NLRA AND TITLE VII, THE COURT OF APPEALS OUGHT TO BE REVERSED, BECAUSE THE DUTY TO BARGAIN IN GOOD FAITH IS NOT VIOLATED WHEN A COMPANY OFFERS TO PROVIDE RELEVANT INFORMATION TO A UNION IN A MANNER OR MEDIUM WHICH PERMITS THE UNION TO FULFILL ITS OBLIGATIONS AS EXCLUSIVE REPRESENTATIVE OF THE EMPLOYEES IN THE BARGAINING UNIT.

The position of *Amici* regarding the application of the National Labor Relations Act (NLRA) to the present case is simple and straightforward: the mere

fact that an employer declines to provide information in the exact manner requested by the union, or through the exact medium requested by the union—although willing to provide it in another manner or through another medium—ought not to be held to violate the employer's duty to bargain in good faith, absent other indicia of employer bad faith. To hold otherwise would be to upset the very sensitive balance between employer and union which is the essence of free collective bargaining and the ideal of freedom of contract.

The factual background of this case shows a continuing series of attempts by the employer to meet the union's needs to represent its members while preserving the viability of the tests. It was against this backdrop of union demand and employer offer that the National Labor Relations Board found that the employer failed to bargain in good faith with the union "by refusing to provide the union with copies of the battery of aptitude tests administered to the employee applicants for the position of Instrument Man B, including the actual test papers of the applicants and the actual test scores made by each employee." [9] Finding the "test of probability of relevance to the duties and responsibilities of the union" [10] to be met, and finding further that the Board did not abuse its "broad discretion" [11] in ordering as a remedy the wholesale production by the employer of its test scores and employee score identification, the court below affirmed the Board.

The court below erroneously assumed that because the information requested by the union was appar-

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[9] Detroit Edison Co., 218 NLRB No. 147.

[10] NLRB v. Detroit Edison, *supra* at 725.

[11] *Id.* at 726.

ently [12] relevant to the performance of its representational obligations, the inquiry regarding the employer's good faith must end. The court below adopted a *per se* rule which had previously been applied only in limited circumstances, which is unsupported by the holdings of its sister Circuits or this Court and which, if allowed to stand, poses a substantial threat to free collective bargaining.

The duty to bargain in good faith [13] applies both to the negotiation of a collective bargaining agreement [14] and to the administration of the agreement once negotiated.[15]

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[12] Only apparently. See the discussion of "face validity," *supra*.

[13] Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees. . . ." Section 8(d), 29 U.S.C. § 158(d), defines collective bargaining as:

> The mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[14] See, *e.g.*, NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595 (1941); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943) and NLRB v. General Electric, 418 F.2d 736 (2nd Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) *rehearing denied*, 397 U.S. 1059 (1970); NLRB v. Call, Burnup & Sims, Inc., 393 F.2d 412 (1st Cir. 1968). Moreover, an employer is required to bargain in good faith over all subjects of mandatory bargaining. NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958).

[15] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

The requirement of good faith bargaining has as one of its principal purposes the furthering of the objective of freedom of contract: to enhance the ability of the parties to collective bargaining to fashion their own terms and conditions of employment, and to administer the terms of their agreement without substantial external interference.[16] Thus, the duty to bargain in good faith has been described as more than a mere obligation to negotiate, because "[t]he employer [or union] who does not wish to bargain collectively could, under a definition requiring simply negotiation, bargain with what amounts to a fixed determination not to reach agreement. . . ." [17] But the test is not one of objective reasonableness, "a requirement that the parties make 'objectively reasonable proposals' and employ objectively reasonable practices and procedures." [18] Had the courts adopted a standard of objective reasonableness, the judiciary would have been put in the position of setting the terms and conditions of the collective agreement, "a substantial interference by government with freedom of contract." [19] So, for example, in *H. K. Porter*

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[16] Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 1963 LAB. L.J. 1016.

[17] *Id.* at 1022.

[18] Ibid.

[19] *Id.* at 1022. See also NLRB v. American National Ins. Co., 343 U.S. 395 (1952). Rather, the standard of good faith bargaining has evolved from cases such as NLRB v. Reed & Prince Mfg. Co., *supra* at 885, where Judge Magruder spoke of the duty to bargain in good faith as an obligation "to confer and negotiate sincerely with the representatives of [the] employees . . . with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation." The obligation to negotiate with the view of trying to reach an agreement has been reiterated in numerous cases such as Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952); NLRB v. South-

Co. v. *NLRB*, 397 U.S. 99 (1970), this Court reaffirmed the principle that good faith bargaining does not permit the Board to impose the substantive terms of a collective bargaining agreement either through a finding of bad faith on the part of an employer or through a remedial order addressed to the employer's bad faith. The Court stated that:

> One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." [20]

The principle of freedom of contract is fostered by requiring the parties to collective bargaining to share information reasonably necessary for informed negotiation.[21] This duty has been described as compelling a finding of a *per se* violation of the Act where there is a failure to provide requested information regarding mandatory subjects of bargaining, such as individual earnings, job rates and classifications, merit increases and pensions, because, in these cases,

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western Porcelain Steel Corp., 317 F.2d 527 (10th Cir. 1963); NLRB v. General Electric Co., *supra* at 736 and United Transportation Union Local 1699 v. NLRB, 546 F.2d 1038 (D.C. Cir. 1976).

[20] H. K. Porter Co. v. NLRB, *supra* at 108.

[21] See, *e.g.*, NLRB v. Acme Industrial Co., *supra*. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942), and Sinclair Refining Co. v. NLRB, 306 F.2d 569 (5th Cir. 1962).

> [t]here could be no negotiation on the subject, in any sense of the term, until the information was supplied to the union. And since there was no bargaining on a statutory subject the NLRB was not required to review the conduct of the negotiations. Neither the manner in which the negotiations were conducted nor the employer's state of mind was in issue. It was only confusing for the NLRB to treat the issues as problems of good faith. . . ." [22]

In *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), this Court appeared to find a *per se* violation of the duty to bargain in good faith where an employer refused to provide financial data requested by the union. The Court affirmed a holding of the NLRB that an employer must present some proof for his assertion of poverty when he uses that assertion as a basis to deny a wage increase. As Mr. Justice Frankfurter noted in his separate opinion, the totality of the evidence presented in *Truitt* did not suggest bad faith: "[t]he totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case." [23] The Court was careful to note, however, that "we do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts." [24] Thus,

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[22] Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1428 (1958).

[23] NLRB v. Truitt, *supra* at 155. Justice Frankfurter thus urged that the case be remanded for further findings regarding the totality of the employer's conduct.

[24] Truitt, *supra* at 153. It is of interest to note that the Court cites NLRB v. American Nat'l. Ins. Co., *supra*, which held that the Board could not properly find that an employer had bargained in bad faith solely by virtue of his insistence on the inclusion of a broad management functions clause in a collective bargaining agreement.

in *Truitt,* while bargaining about wages certainly could have proceeded without the information requested by the union, the employer put his financial ability forward as a matter of discussion and thus made his economic situation a relevant issue in the negotiations.

It thus appears that where a party to collective bargaining or to a collective agreement has refused the other party's request for information so totally that bargaining or other representational activities—for example, grievance negotiation—regarding statutory subjects cannot proceed, a *per se* violation of § 8(a)(5) has occurred; moreover, a party's refusal to provide information on a subject which he has introduced may be a violation of § 8(a)(5), where the information requested by the other party is relevant to the subject voluntarily introduced by the first party. In both of these instances, free collective bargaining—the freedom of contract ideal—is hampered by the refusal of one side to provide relevant information. But the refusal of one party to provide information requested by the other in the precise form requested by the second party, where the information actually offered permits the requesting party to perform its bargaining or representational obligations, does not hamper free collective bargaining. Further, a Board or court order mandating the precise manner and form of shared information is precisely the sort of intrusion into the collective bargaining process which undermines the statutory objectives of freedom of contract.[25]

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[25] See, for example, NLRB v. American Nat'l. Ins. Co., *supra,* where this Court notes, "Congress provided expressly that the Board should not pass on the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters is an issue for determination across the bargaining table, not by the Board."

In the instant case, the court below was blind to the statutory goal of freedom of contract and adopted a *per se* rule, improperly construing its own decision in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968) and the Ninth Circuit decision in *Emeryville Research Center* v. *NLRB,* 441 F.2d 880 (9th Cir. 1971).

In *Kroger* v. *NLRB, supra,* the court denied enforcement of a Board order which would have compelled the employer to disclose its entire "operating ratio" (O.R.) program to the union. The court found that the O.R. program, even though it was relevant to the union's representation function, "covers many facets of managerial concern which are in nowise related to the union's collective bargaining function."[26] The Court held that the employer had not violated its duty to bargain in good faith for a failure to provide the union with all information which the union viewed as relevant in meeting its obligations as exclusive representative of the employees in the bargaining unit, absent other evidence of employer bad faith. Rather, the Court declared:

> Where the union has sought considerably more information than is required or is relevant to its collective bargaining purposes, and where in fact collective bargaining has been in progress since 1943 with no unresolved grievances or contract disputes, it seems something of a contradiction in terms to find the company guilty of refusing to bargain in good faith by its refusal to disclose the total O.R. program.[27]

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[26] *Kroger, supra* at 457.

[27] *Id.* at 459.

Similarly, in *Emeryville Research Center* v. *NLRB, supra,* the Ninth Circuit rejected a *per se* rule under which the employer would have been found to have failed to bargain in good faith merely because he refused to provide the union with information in the manner requested by the union, where there was no indication of employer bad faith. The Ninth Circuit accepted the finding of the Board that the information requested by the union was relevant to the performance of its duties, but held that "[w]here . . . the Company raises *bona fide* objections to the form in which information is requested and offers to provide information sufficient to meet the Union's need in a mutually satisfactory form, the Union must do more than rely on general avowals of relevance in order to establish its right to the information." [28] The Court in *Emeryville, supra,* distinguished a number of cases cited by the NLRB for support of a *per se* rule. After careful analysis of the applicable caselaw the *Emeryville* court noted that "none of the cases cited by the Board holds that a union has a *per se* right to information in the precise form demanded".[29]

In the case at bar, the court below dismissed *Kroger* and *Emeryville* on the grounds that in those cases the unions' requests were not specific and the showing of need was very general.[30] But the court below ignored the fact that in both *Kroger* and *Emeryville,* it was found that the unions' information requests were relevant. It was the employer's *response* to those requests which was at issue, just as it is in this case. And in those

[28] *Emeryville, supra* at 885.

[29] *Id.* at p. 887, emphasis the Court's.

[30] NLRB v. Detroit Edison, *supra* at 725.

cases, as here, the employers had *bona fide* reasons for not wishing to provide the information requested in the manner requested: in *Kroger* because it would entail disclosing non-relevant data, and in *Emeryville* because of the cost involved in compiling the data in the form requested by the union and because of the chances of improper disclosure. In *Emeryville,* the employer merely offered to discuss the union's request so as to find a mutually satisfactory form for supplying the information. In the instant case, Detroit Edison offered to supply the information in a form and manner actually more usable than that requested by the union. As the Court in *Emeryville* declared: "[W]e do not think there would be the slightest basis for an unfair labor practice charge where the Company offers information in a form different from that demanded but which nonetheless meets every need stated by the union." [31]

In the instant case, the court below even questioned the relevancy of the union's demands, but rested its decision to enforce the NLRB's order on its understanding of the Board's wide discretion to fashion NLRB remedies. However, the Court misunderstood the nature of this case: the question is not whether the NLRB abused its discretion in ordering the remedy it did, but rather whether the Board abused its discretion in finding employer bad faith in the first instance. The court itself recognized the generosity of Detroit Edison's offer, and admitted that the employer's proposed means of disclosure might be of greater use to the union than direct disclosure. To require more of the employer under the guise of good faith bargaining is to make of the good faith requirement something not intended by the Congress.

[31] Emeryville, *supra* at 884.

Even were the court below correct in addressing the issue as one of remedy, the court below incorrectly perceived the Board's Order. By amending the initial Order of the Administrative Law Judge, the Board imposed a remedy unnecessary to the effectuation of the Act and threatening to the Act's underlying freedom of contract purpose. Just as this Court in *H. K. Porter Co.* v. *NLRB, supra,* found that "it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands," [32] the court below improperly upheld Board discretion in determining the precise manner in which relevant informaton was to be shared by the parties when one of the parties had *bona fide* reasons for objecting to the manner of sharing and the other party would not be injured in the performance of its statutory duties by an alternate manner of sharing.

Professor Cox has summarized well the temptation to which the Court fell prey and the danger implicit in accepting such a course:

> The duty to bargain—to meet and treat—was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement. It is a natural step forward to regulate the character of the negotiations so as to increase the probability of rational discussion—but it is also a step carrying many implications.[33]

[32] H. K. Porter v. NLRB, *supra* at 109.

[33] Cox, *supra* at 1433.

By ordering the Company to provide the union with copies of its tests, answer sheets, and scores of identified individuals, the Court has attempted "to regulate the character of the negotiation" between the Company and the union and, by so doing, has vastly increased the bargaining power of the union without providing the union with any more information that it rationally needs to represent the interests of the bargaining unit. The risks of disclosure to the employer are so great, and the limitations on the union's ability to disclose so tenuous,[34] that the bargaining positions of the parties are subject to dramatic alteration.

III.

THE IMPACT OF THIS DECISON ON PUBLIC EMPLOYERS

The membership of *Amicus* ASPA is drawn from personnel professionals in both the private and the public sectors. *Amicus* IPMA represents agencies and individuals in the public employment sector only. Both *Amici* urge the Court to bear in mind, in its consideration of this case, the special impact its decision may have on public employment—even though public employment is not subject to the NLRA.

Since 1972, public employers at all levels have been covered by Title VII and are subject to the full range of equal employment requirements—including the requirement that employee selection procedures be job-related and validated in accordance with the professional standards of the American Psychological Association. *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977) *cert. denied* —— U.S. ——; see *Wash-*

[34] See, Note *"Psychological Aptitude Tests and the Duty to Supply Information*: NLRB v. Detroit Edison Co., 91 HARV. L. REV. 869, 875-876 (1978).

ington v. *Davis, supra.* Further, public employers are subject to a host of equal employment obligations emanating from the plethora of federal grant programs.[35] The penalties for violation of the equal employment provisions of these grant programs can include loss of federal funds as well as remedial relief to the alleged discriminatee. *United States* v. *City of Chicago, supra.* Public employers rely heavily on the use of objective selection devices in their employment processes because of the numbers of applicants, the strict merit requirements of state civil service laws, and the requirements of federal statute. See 42 U.S.C. § 4701 *et seq.*

The costs of developing tests and conducting the necessary validation studies by public employers are not inconsequential. It has been estimated that the cost to public employers of complying with the validation requirements of the Federal Executive Agency Guidelines would run into several millions of dollars. The City of Hartford, Connecticut, estimates an average cost of $2 million to develop and validate its selection procedures.[36]

While public employers thus have an obvious interest in preserving their ability to use validated employee selection tests, they have an equal interest in the labor relations implications of the decision below. By 1974,

[35] See, *e.g.*, Revenue Sharing Act of 1972, 31 U.S.C. § 1221. The statute, 31 U.S.C. § 1242 establishes the non-discrimination requirements. Department of the Treasury's implementing regulations adopt the current EEOC testing guidelines for recipient governments. 31 C.F.R. § 51.53(b) (1977).

[36] Report of the Comptroller General, ***Problems with Federal Equal Employment Opportunity Guidelines on Employee Selection Procedures Need to be Resolved,*** FPCD-77-54 (Feb. 2, 1978).

there were bargaining units in over 11,000 state and local government units, covering a total of 4,736,000 employees or 49.8% of full-time state and local employees.[37] In fact, the public sector has witnessed the most significant growth in union organizing in the past decade. While the specifics of public sector labor relations laws vary with each jurisdiction, the private sector model is being adopted by a growing number of public jurisdictions.[38] Thus, for example, the duty of the employer to bargain in good faith is now generally considered to be a basic requirement of the public sector labor relations scheme. The state courts or administrative adjudicatory bodies look to federal precedent in deciding their own statutory issues. As noted by the Supreme Court of Connecticut: "The language [of the Connecticut statutes] is essentially the same and for this reason the judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own acts." *West Hartford Education Association* v. *DeCourcy,* 295 A.2d 526, 534 (1972).[39]

Thus the precedent set by this Court in interpreting the good faith bargaining obligation of the National Labor Relations Act will have significant impact upon public employers and upon their ability to use professionally validated employee selection procedures. Indeed, because of the significant cost of developing new tests and the potential enormous liability public em-

[37] U.S. Department of Commerce, U.S. Department of Labor: ***Labor-Management Relations in State and Local Governments, 1976*** (April 1978).

[38] See Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations,* 30 MD. L. REV. 179 (1970).

[39] See also West Irondequoit Teachers Association v. Helsby, 315 N.E. 2d 775 (N.Y. 1974); PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975).

ployers face from the various equal employment laws and requirements they are subject to, the impact on public employers could be even greater than on private employers were the decision below affirmed.

CONCLUSION

Affirmance of the decision below could gravely hobble the ability of conscientious employers to put the right person in the right job. Tests validated according to professionally accepted standards are the preferred method of accomplishing this purpose. Yet, confronted with the prospect that test data must be disclosed to their unions, employers cognizant of their Title VII obligations, caught between the competing requirements of Title VII and the NLRA, will be forced as a practical matter to end their search for objective, color-blind, sex-blind, merit-based personnel systems. Such a lack of balance between national policies affecting labor relations was precisely what this Court warned against in *Emporium Capwell* v. *W.A.C.O.*, 420 U.S. 50 (1975). See *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *cert. dismissed.*

In addition, in view of the important national objective of free collective bargaining as expressed in the ideal of freedom of contract, the basic principles of the good faith obligations of the parties to collective bargaining should be restated in light of the increasingly sophisticated forces at work in the economy. Without such a restatement, the freedom of collective bargaining may well be eroded by the rote application of legal concepts.

The decision below should be reversed.

Respectfully submitted,

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